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No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1930

INTERNATIONAL PAPER CO., PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES

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ERRATUM

On page 18 of the brief for the United States heretofore filed, the word "petitioner" occurring on the sixth and seventh lines from the top should be amended to read "Power Company."

ADDITIONAL CITATIONS

As bearing upon the effect of the statutes upon which the petitioner relies in its reply brief, see the volume published by the Government Printing Office in 1918 entitled: "Emergency Legislation, Passed Prior to December, 1917, Dealing With the Control and Taking of Private Property

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for the Public Use, Benefit, or Welfare; Presidential Proclamations and Executive Orders Thereunder, To and Including January 31, 1918. Summary Memorandum. By J. Reuben Clark, Jr., Major, Judge Advocate General's Officer's Reserve Corps, Assigned to Special Duty with the Attorney General of the United States."

A copy of this volume is in the Library of the Department of Justice. We refer particularly to the following pages of that part of this publication called "Summary Memorandum:" 14–16. Also cf. Statutes analyzed on pp. 63–68.

An examination of the Executive Orders which appear on pages 169–200 of that part of the publication headed "Emergency Legislation" does not disclose any delegation by the President to the Secretary of War of authority conferred by the National Defense Act (Act of June 3, 1916, c. 139, 39 Stat. 166, 213; U. S. C., Title 50, Sec. 80). Executive Order No. 2687, of August 21, 1917 (pp. 176–177), delegates authority under the Naval Emergency Fund Act to the Secretary of the Navy.

We have also examined a pamphlet published by the Government Printing Office in 1921 bearing the following title: "The Power Situation During the War, By Col. Charles Keller, Corps of Engineers, with Appendixes Containing Reports on Conditions in the Several Power Districts. Published by Authority of the Secretary of War." On

pp. 46–47 of this pamphlet appears the following statement:

THE FINAL PLAN OF RELIEF

PROPOSED RELIEF

In order to definitely remedy the power shortage after consultation with the other departments of the Government and interests concerned, and after final approval by the President of the course proposed, the War Industries Board, in August, 1918, requested Congressman T. W. Sims, chairman of the House Committee on Interstate and Foreign Commerce, to introduce a bill the object of which was to allow the President to provide means for the better utilization of existing sources of power and the development of new sources. It provided $175,000,000 for the purchase and building of power plants. The bill was drawn on broad lines, authorizing the building of power plants, the increase in capacity of private plants or assistance in equipping or expanding such plants, the purchase of power plants, the leasing of plants or taking over of their product and its distribution, and the construction of pipe or transmission lines necessary for distribution or interconnection. Authority was further given to change, cancel, or suspend any existing and future contracts for power so that it might be distributed to the advantage of the production of war material. New corporations could be formed, private or public rights

acquired, mergers or consolidations of private plants could be made, and property acquired could be duly sold, if desirable, under certain reasonable restrictions. This bill, known as H. R. 12776, would have solved the problem of obtaining additional power and would ultimately have made available means for relieving many localities where power was short.

The bill was supported in person before Congress by the Secretary of War; Chairman Baruch, of the War Industries Board; and Director Garfield, of the Fuel Administration; also by the Shipping Board, the War Finance Corporation, and others. Its passage was urged by all familiar with the problem of sufficient power supply. It passed the House and in due course was submitted to a Senate committee for investigation, when the events leading up to the German defeat began and the consideration of the bill ceased with the signing of the armistice. It is proper to state here that the Senate committee had not approved the bill as presented to it and had one or two substitutes under consideration when the war ended. A copy of the bill is appended, marked "Exhibit C."

A copy of the bill, H. R. 12776, appears on pp. 126–130. It is entitled:

> A bill to provide further for the national security and defense and for the more effective prosecution of the war by furnishing means for the better utilization

of the existing sources of electrical and mechanical power and for the development of new sources of such power, and for other purposes.

The following extracts are pertinent, but do not give and are not intended to give any indication of the entire scope of the bill:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when used in this act, unless the context shall require a different interpretation—

* * * * *

(g) The term "to acquire" means to purchase, requisition, condemn, or take over the title to, or to lease, requisition, condemn, or take over the right to use, occupy, or operate the whole or any part of; and, unless it shall be limited by the context, includes all such acts.

* * * * *

SEC. 2. That the President is hereby authorized and empowered, within the limits of the amounts herein authorized, or that may hereafter be authorized—

(1) To construct at any place or places within the boundaries of the United States such power plant or power plants as he may deem necessary; * * *

(2) For the purpose of increasing the capacity or productivity of any private power plant within the boundaries of the United States to install in any such plant any struc-

ture, machinery, or appliances that he may deem useful to that end, either through agents or contractors employed by him, or by providing the owner or operator of such plant with funds to be applied to that purpose: * * *

(3) To aid in equipping any private power plant or in expanding any such plant to such extent as he may direct by making advances, upon such terms and conditions as he may determine, to the person operating or authorized to operate it. * * *.

* * * * *

(10) In furtherance of any of the foregoing purposes, to acquire any property or property rights, including any public or private rights, or any interest in any such rights; or any material, machinery, appliances, or processes, patented or otherwise, which he may deem necessary or useful for the construction, development, expansion, or operation of any such plant or transmission lines.

* * * * *

SEC. 4. That whenever any act done pursuant to the provisions of this act shall constitute a taking of private property within the meaning of the Constitution, just compensation shall be made therefor in an amount to be determined by the President; and if the amount so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so

determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per cetnum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

JANUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE 1931

SUPREME COURT OF THE UNITED STATES.

No. 37.—October Term, 1930.

International Paper Company, Petitioner, vs. The United States.	On Writ of Certiorari to the Court of Claims.

[January 19, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding by the petitioner to recover compensation for property rights in water of the Niagara River alleged to have been taken by the United States for war purposes. The Niagara Falls Power Company by private grant to it, Letters Patent from the State of New York and acts of the Legislature of that State, was the owner so far as the law of New York could make it owner of land and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate.

On December 28, 1917, the Secretary of War wrote to the Power Company that "The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defence, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and for your plants and machinery connected therewith." Immediate and continuous delivery of such power was directed and it was added "You will be paid fair and just compensation for power delivered here-

under." At the same time an agreement was made by the Secretary of War and the Power Company, (reciting that the President has requisitioned the power as above,) to the effect that the Secretary of War "acting for and in behalf of the United States" until further notice waives delivery of the power to the United States on the express condition that the Power Company shall distribute such power as provided in a schedule naming companies and amounts but not naming the petitioner, and on the other side the Power Company waives all right of compensation by reason of said requisition if permitted to carry on its business and to sell consistently with the exigencies of the national security and defence. On December 29, the representative of the Secretary of War wrote to the secretary of the Power Company "Please note that the requisition order covers also all of the water capable of being diverted through your intake canal. . . . This is intended to cut off the water being taken by the International Paper Company and thereby increase your productive capacity." And on December 31 telegraphed to the counsel of the petitioner "Power Company has been directed to take water hitherto used by International Paper Co." The petitioner had been notified of what was to happen but was allowed time to run out its stock on hand. On February 7, 1918, its use of the water ceased and was not resumed until midnight November 30, 1918, when the order of December 28 was abrogated. The Court of Claims found that the shutting off of the water from the petitioner's mill cost it $304,685.36, direct overhead expense, but gave judgment that the petition be dismissed.

The Government has urged different defences with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late.

We shall accept as sufficient answer the reference of the petitioner to the National Defence Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

Then it is said that there was no taking, but merely a making of arrangements by contract. But all the agreements were on the footing that the Government had made a requisition that the other party was bound to obey. *Liggett & Myers Tobacco Co.* v. *United States*, 274 U. S. 215, 220. It is said that the Power Company and the petitioner could withdraw water from the River only by license from the United States, under the Act of June 29, 1906, c. 3621, 34 Stat. 626, and that the license was revoked by what was done. But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish. There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use. It is true that the petitioner did not come within the scope of the Government's written promise to pay. But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. *Phelps* v. *United States*, 274 U. S. 341, 343. *Campbell* v. *United States*, 266 U. S. 368, 370, 371. *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656. Of course it does not matter that by a subordinate arrangement it directed the use of the power to companies that would fulfil its purposes rather than to machinery of its own. That arrangement it was able to make only because it took the power.